I do not wish my decision to be taken as implying my view of the merits of the cases.

I would only point out that, judging from the record, the legal basis of the prosecution case against the 2nd accused does not appear to have been explained and stated to the Court below.

The order of the Magistrate acquitting and discharging the accused is set aside, and I direct that there be a re-trial of these cases before another Magistrate.

Retrial ordered.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) & GORDON-SMITH, Ag. J.A.

December 12, 1939.

LEE PAK YIN & ANOTHER

v.

LIEW SIEW YIN & ANOTHER.

[PERAK CIVIL APPEAL No. 11 of 1939]

Courts Enactment, Ss. 10, 26—appeals—transfer from one Appeal Court to another—jurisdiction—stay of proceedings pending disposal of appeal—grounds on which stay may be granted.

Under section 10 of the Courts Enactment the sittings of the Court of Appeal are fixed by the Chief Justice with the concurrence of the High Commissioner, and appeals from the decision of the Court of a Judge at Ipoh are ordinarily heard at the Court of Appeal held at Ipoh, in accordance with the Gazette Notification. Only the Chief Justice can transfer an appeal from one Appeal Court to another, or direct that an appeal be heard otherwise than provided for in such notification. Such a transfer should, in the absence of consent, only be made when the disposal of the appeal is a matter of extreme urgency.

Seethai Achi v. Moneylending Firm of A.N. (4) followed.

In a proper case the Court of Appeal, under section 26 of the Courts Enactment, whenever or wherever it is sitting, can direct a stay of execution or suspend proceedings under any decision appealed from.

Cases referred to:—

(1) *Blakeney v. Dufaur,* 57 E.R. 451.

(2) *Prosonomoyi Devi v. Madhab Rai,* I.L.R. 5 All 557.

(3) *Rowe v. Wood,* 37 E.R. 740.

(4) *Seethai Achi v. A. N. Firm,* (1931–1932) F.M.S.L.R. 234.

(5) *Sidheswari v. Abhayeswari,* I.L.R. 15 Cal. 818 at 822.

(6) *Watkins v. Brent,* 40 E.R. 313.

MOTION.

Braddell (*Ramani* with him) for Appellant:

The application is for transfer of the Appeal from Ipoh or for stay.

I move now only for stay.

This is a suit against trustees to have them removed.

Two elementary rules of the Courts are:—

1. A receiver is never appointed against trustees except on a special case—properly made out, and
2. On an interim application the Court would never try the issues.

The case of *Blakeney v. Dufaur,*[1] cited for the Respondents in the Court below also decides that a Court will not decide such matters on an interlocutory application.

The other cases cited refer to the power to remove.

It is conceded that in a proper case there exists such a power.

But the cases cited have nothing to do with the appointment of a receiver against executors.

The only case relevant and appropriate was cited by us:

Prosonomoyi Devi v. Madhab Rai,[2].

The rules of the Court of Chancery are made applicable by our Section 500.

The rule in India is the same as the rule in England.

See also *Sidheswari v. Abhayeswari,*[5].

Rowe v. Wood,[3] commented on trying issues on affidavits.

As to the true rule see also *Watkins v. Brent*[6].

A Receiver is never appointed when there is a person in legal possession.

I submit *prima facie* the order is one proper to appeal from and therefore a stay is not unjust.

Hastings for the respondents:—This Court has no power to make any order at this stage.

No doubt the Court can order stay.

But the application must be made to the proper Court of Appeal.

This is not the Court of Appeal to which the application in this Appeal should be made.

See Section 10 (ii) of Courts Enactment and Gazette Notification of the 16th December, 1938.

I submit this Court no jurisdiction.

As to the merits I agree on the law.

But there are matters alleged in this suit, which will warrant an appointment of a receiver.

One should not apply English principles with strictness in this country.

It might be if there were no receiver the success of the respondents would only remain on paper.

Braddell, in reply:—It is wrong to suggest Section 10 (ii) of the Courts Enactments is an administrative provision.

See *Seethai Achi v. A. N. Firm*[4].

Jurisdiction should not be confused with the *locale.*

There is no power in the Court to change the venue of an appeal By section 10 (ii) of the Courts Enactment civil appeals shall be heard on such dates and at such places as the Chief Justice appoints by notification in the Gazette.

Gazette Notification No. 6036 fixed the hearing of Ipoh appeals at Ipoh on certain dates.

The proviso refers to a ministerial act not a judicial one and whatever the procedure may be to obtain a direction from Chief Justice it is a matter for him alone and not for the Court of Appeal.

An application has been made to the Chief Justice in Chambers and has been dismissed.

I admit that the Court of Appeal has power to grant a stay in any case. In this case to grant a stay would be in fact to allow the appeal.

The law on this matter is clear. It is for the Plaintiff-Respondent to satisfy the Court that there is good ground for such an order. It is submitted they have done so. There is no answer to two of the very serious allegations made in the plaint and the affidavit.

The conclusion come to by the trial Judge should not be overruled.

Cur. Adv. Vult.

Poyser, C.J.—In this suit Murray-Aynsley J. made an order, on the 26th of October 1939, appointing a Receiver to receive the rents and profits of the estate and effects of Lim Seng Chew deceased. The plaintiffs (Respondents) are the widows of the deceased, the defendants are his executors and trustees. The plaintiffs are entitled, subject to certain contingencies, to the whole estate of the deceased; they make serious allegations against the defendants of mis-management of the deceased's estate and also of misappropriation. Murray-Aynsley J. held, after a consideration of the affidavits filed, that it was desirable to safeguard the assets of the estate, and that the appointment of a Receiver would in no way prejudice the issues to be determined at the trial, and he accordingly made the order which is the subject of this appeal.

An application was made before me on the 2nd of November, under the provisions of section 10 (ii) of the Courts Enactment, for the transfer of this appeal from the Ipoh to the Kuala Lumpur Court of Appeal. The grounds of this application were that the defendants were greatly prejudiced by the order complained of, and that it was a matter of urgency that the appeal should be disposed of at the earliest date possible. Mr. Hastings on behalf of the plaintiffs opposed the transfer.

I refused the application, firstly because I was not satisfied as to the urgency of the appeal, and secondly because I thought that as the Court of Appeal was sitting in fourteen days' time at Kuala Lumpur, that such an application could more suitably be disposed of by the Court of Appeal. I also thought that this was a convenient opportunity for the Court of Appeal to express their views in regard to the powers of the Chief Justice under section 10 of the Courts Enactment.

The Motion we now have to consider is that the appeal be transferred to the Court of Appeal in Kuala Lumpur or, in the alternative, that all further proceedings under the order of Murray-Aynsley J. of the 26th of October 1939 be stayed pending the disposal of the appeal.

Mr. Braddell on behalf of the appellants did not press for the transfer of the appeal, principally because the Court would not have had the time to dispose of it; but he did press for a stay of proceedings pending the hearing of the appeal. At the conclusion of the arguments we refused both the transfer and the stay, and stated that our reasons for so doing would be embodied in a written judgment.

In the first place I am of the opinion that only the Chief Justice can transfer an appeal in a civil matter from the Court of the Judge at Ipoh to the Court of Appeal held at Kuala Lumpur. Under the provisions of section 10 of the Courts Enactment, the sittings of the Court of Appeal are fixed by the Chief Justice with the concurrence of the High Commissioner, and appeals from the Court of the Judge at Ipoh, as this appeal is, are ordinarily heard at the Court of Appeal held in Ipoh, in accordance with the Gazette notification; and only the Chief Justice can transfer an appeal from one appeal Court to another, or direct that any appeal be heard otherwise than provided for in such notification.

Similar views were expressed in the case of *Seethai Achi v. Money Lending Firm of A.N.*,[4] and a transfer by a puisne Judge was held to be bad. I do not think there is the slightest doubt that this decision was correct, and I would only add that, in my opinion, such a transfer should, in the absence of consent, only be made when the disposal of an appeal was a matter of extreme urgency; and as stated before, I am not satisfied that there is any urgency in regard to the disposal of this appeal.

In regard to the alternative motion before us, I also think there is no doubt that the Court of Appeal, under section 26 of the Courts Enactment, whenever or wherever it is sitting, can direct a stay of execution or suspend proceedings under any decision appealed from, and consequently we can consider whether a stay should or should not be granted.

The principles of law that should guide a Court in considering a motion of this nature are clearly set out on pages 13 to 15 of *Kerr* on Receivers, 9th edition, and may be summarised as follows. The Court will not dispossess an executor or trustee upon slight grounds. A strong case must be made out to justify the dispossession of a Trustee or Executor who is willing to act. If any misconduct, waste, or improper disposition of the assets can be shewn, or if it appears that the Trust property has been improperly managed, or that a person in a fiduciary position has been guilty of a breach of duty, there is a sufficient foundation for the appointment of a Receiver.

Bearing those principles in mind, I do not think a stay of proceedings should be granted. It was argued (*inter alia*) that an impossible situation had been created by the appointment of the Receiver. There is, however, nothing to prevent any further application for the appointment of a manager, if such is necessary, or for any other variation of the order.

The main grounds of objection were that the order dispossessed the Executors and Trustees on inadequate grounds, and in fact, that it was impossible for the learned Judge to make the order without trying the issues in the suit. If this is so, then it would be quite impossible for any Court to make an interim order appointing a Receiver against Executors and Trustees, in any action founded on breach of duty. As a matter of fact the learned Judge specifically guarded himself against expressing any opinion which might prejudice the issues to be determined at the trial. Undoubtedly he must have perused the affidavits for and against the Motion, and came to the conclusion that it was a proper case for the appointment of a Receiver.

On a perusal of those affidavits it is clear that many allegations against the appellants have either been ignored in the affidavits in reply, or have been inadequately controverted, and that there is a strong *prima facie* case disclosed for the appointment of a Receiver, and particularly so in view of the fact that the two plaintiffs are contingently entitled to the whole residue of the estate of the deceased within three years.

There are, therefore, no sufficient grounds for granting a stay, and the motion is dismissed with costs.

McElwaine, C.J. (S.S.)—I concur.

Gordon-Smith, Ag. J.A. (Malaya)—I concur.

Motion dismissed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

January 19, 1940.

GOH SENG KOK v. PUBLIC PROSECUTOR.

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 2 of 1939]

Criminal Procedure Code (Cap. 6), S. 113 (ii)—Statements made in course of police investigation—admissibility in evidence of.

A statement made to the police by witnesses for the defence in the course of a police investigation is admissible in evidence under S. 113 (ii) of the Criminal Procedure Code. This is even so where such witnesses at the time of making the statement were accused persons provided they were not accused persons at the time the statement was referred to.

MAGISTRATE'S CRIMINAL APPEAL.

M. Morrison for the appellant.

T. D. Wallace, Deputy Public Prosecutor, for the Public Prosecutor.